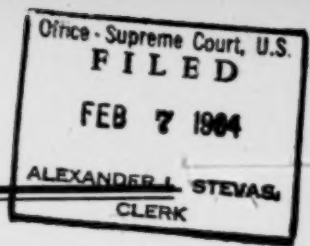


83-1306



NO.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

ALTON CLARK BINGHAM,

Petitioner,

v.

NEVADA STATE BOARD OF ACCOUNTANCY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM B. TERRY, ESQ.
520 South Fourth Street
Las Vegas, Nevada 89101
Telephone: (702) 384-5563

Attorney for Petitioner:
ALTON CLARK BINGHAM

(i)

QUESTIONS PRESENTED FOR REVIEW

1. Is there a due process violation when an administrative body, here, the Board of Accountancy for the State of Nevada, entertained evidence and made findings which were at variance with the charges in the complaint?

2. Was there a violation of Petitioner's constitutional right to confront witnesses against him?

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

ALTON CLARK BINGHAM,

Petitioner,

v.

NEVADA STATE BOARD OF ACCOUNTANCY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF NEVADA

ALTON CLARK BINGHAM petitions for a writ of certiorari to review the Judgment of the Order Dismissing Appeal filed by the Nevada Supreme Court in the instant case.

OPINION BELOW

On September 27, 1983, the Nevada Supreme Court entered an order dismissing an appeal affirming the Nevada State Board of Accountancy's decision to revoke Petitioner BINGHAM'S license to practice certified public accounting in the State of Nevada. A Petition for Rehearing was thereafter filed and a stay granted by the Nevada Supreme Court and the court did, on November 9, 1983, enter its order denying a rehearing. A copy of the Order Dismissing the Appeal is reproduced as Appendix "A" and a copy of the Order Denying the Rehearing is reproduced as Appendix "B". The Court Below held that the Petitioner's due process rights had not been violated even though the Board entertained evidence and made findings at variance with the charges in the complaint filed against him. The Court further held that even though a transcript of testimony made without the Petitioner being present had been introduced against him, the statements in the transcript were sufficiently corroborated by other evidence and thus, his confrontation rights had not been violated. The Court further held that hearsay statements, even though admissible in evidence, would not without corroboration support suspension of a license.

Other matters were also raised which are not the subject matter of the instant Petition.

JURISDICTION

Jurisdiction was originally initiated in the State of Nevada by an order to show cause why the license to practice accountancy should not be revoked against ALTON CLARK BINGHAM and jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1251 and §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in part:

“Nor shall any state deprive any person of life, liberty or property without the process of law nor deny to any person within its jurisdiction, equal protection of the law.”

The Sixth Amendment to the United States Constitution provides, in part:

“In all criminal prosecutions, the accused shall . . . be confronted with the witnesses against him. . . .”

STATEMENT OF THE CASE

On September 14, 1979, the Respondent, NEVADA STATE BOARD OF ACCOUNTANCY (hereinafter “The Board”) filed a complaint and order to show cause why Mr. BINGHAM’S certificate to practice as a Certified Public Accountant should not be revoked. From December 11, 1979 through and including February of 1980, five dif-

ferent hearings were held to receive evidentiary material against the Petitioner. The transcript of these proceedings stands more than 1,000 pages. On June 25, 1980, the Board rendered its findings of fact, conclusions of law and a decision which revoked ALTON CLARK BINGHAM'S license to practice as a Certified Public Accountant. Within the jurisdictional time limit, a petition for judicial review was thereafter filed.

On September 1, 1982, the District Court signed its Order affirming the order of the Nevada State Board of Accountancy and eventually an appeal was had before the Nevada Supreme Court which ultimately ordered dismissal of the appeal.

Factually, the instant case was initiated based upon the complaint and order to show cause why Mr. BINGHAM'S certificate to practice accountancy should not be revoked, said complaint having been filed on September 14, 1979. The specific charge which was listed on the complaint stated:

"Respondent did engage in the dishonorable, fraudulent and discreditable act of forging customers signatures on markers and converting said markers to monies for his own use while employed by or consulting the South Point Nevada Club."

The complaint then stated that this action constituted "an act discreditable to the profession" and ordered Mr. BINGHAM to appear at a hearing to see whether his license should be revoked.

In response to the complaint for an order to show cause, Petitioner filed "an application for a more definite and detailed statement" pursuant to N.R.S §233B.121 (d) in order to ascertain the evidentiary support for the charge that

Mr. BINGHAM had "forged" markers and converted the monies to his own use. The Board thereafter filed a response which essentially attempted to alter the charge made in the complaint and order to show cause. Thus, instead of providing information to show that Mr. BINGHAM had actually forged certain markers, the Board used the response as a method to detail charges which were not mentioned in the complaint; for example, the Board stated:

"The Board does not at this time make any specific allegation as to whether Alton Clark Bingham forged customers' signatures but the Board does allege that Mr. Bingham was specifically involved in the misappropriation of various funds from the South Point Nevada Club."

Some nine months after the complaint had been issued and some four months after the hearings had been completed against Mr. BINGHAM, the Board issued its findings of facts, conclusions of law and a decision which revoked Mr. BINGHAM'S license to practice as a Certified Public Accountant. In the conclusions of law, many of them did not even remotely relate to the charge of Forgery, as outlined in the complaint. The Board, for example, concluded that Mr. BINGHAM had (a) accepted \$2,000.00 in exchange for a marker without the customer being present; (b) participated in the embezzlement of various funds from the South Point Nevada Club; (c) failed to exercise due diligence in the adherence to internal controls and Regulation 6 submission to the Gaming Control Board; (d) participated in the settlement of (an) outstanding marker; and (e) admitted forging signatures not on markers but on automobile leases, checks and other documents.

REASONS FOR GRANTING THE WRIT

I.

A DUE PROCESS VIOLATION OCCURRED WHERE AN ADMINISTRATIVE BODY, HERE, THE BOARD OF ACCOUNTANCY, ENTER-TAINED EVIDENCE AND MADE FINDINGS WHICH WERE MADE AT VARIANCE WITH THE CHARGES IN THE COMPLAINT.

As noted previously, the complaint and order to show cause specifically stated that ALTON CLARK BINGHAM had engaged in "the dishonorable . . . act of forging customers' signatures on markers, and converting said markers to monies for his own use. . . ". Petitioner raised a significant objection dealing with the notice of charges which were actually given in the complaint. Thus, Petitioner insisted that the only evidence which was admissible to support revocation of his license, was that evidence which would actually show that he had "forged" customers' signatures on markers and converted the money to his own use. As part of the objection, Petitioner's counsel noted that no amended complaint had ever been served upon Mr. BINGHAM detailing any other charge other than that initially listed in the complaint and order to show cause. Thus, Petitioner insisted that the Board could not enlarge upon the charges listed in the original complaint simply by providing discovery in the case. (Transcript, December 10, 1979, pp. 19-22, 38-39). As required by the Administrative Procedures Act (N.R.S. §233B.121 (1)), the Board chairman only noted the objection, and in effect, gave leeway to the Board counsel to introduce any evidence of wrongdoing whether related to the complaint or not.

Consequently, the Board heard testimony and made findings of fact which were totally unrelated to proof of forgery or embezzlement. For example, the Board found that Mr. BINGHAM had "failed to exercise due diligence and adherence to acceptable internal accounting controls"; "failed to adhere to the written and diagramatic system of control submitted to the Gaming Control Board"; engaged in transactions which "were without apparent regard to the Federal and State Tax Regulations on the exchange, or the possibility of depletion of company resources"; and "admitted he had forged the signature of Mr. Jenkins [the owner of the South Point Nevada Club] on automobile leases, ...".

Petitioner insists that the Board violated his right to due process by accepting evidence, and rendering findings of fact and conclusions of law which were unrelated to the initial charge.

Courts have long held that a party subjected to administrative revocation of a license is absolutely entitled to due process of law. The underpinnings of the due process requirement explicitly appear in the Administrative Procedures Act. Thus, N.R.S. § 233B.121(1) provides that "in a contested case", all parties shall be afforded an opportunity for hearing after reasonable notice." See also, N.R.S. § 628.400 *et seq.* [which statutes particularly set forth the due process requirements for revocation of an accountant's license.]

The Nevada Supreme Court has held that an administrative agency "cannot act without notice and a reasonable opportunity to be heard and must act within constitutional limits". *Checker, Inc. v. Public Serv. Comm'n.*, 84 Nev. 623, 634, 446 P.2d 981 (1968).

It has also been held that due process in the context of an administrative proceeding requires specific notice of *each issue* to be considered.

"Notice is rightfully considered to be a critical aspect of due process to be afforded in any administrative process.

The essentials of due process permit administrative regulation only by adherence to the fundamental principles of constitutional Government. The Legislature must appropriately prescribe standards of administrative action. The quasi judicial action thus prescribed, must faithfully observe the 'rediments of fair play'. ...

Appurtenant to the right to notice is the right to be fairly notified as to the issues to be considered: ... the procedure chosen by the Commission must of course give the parties fair notice of exactly what the Commission proposes to do, together with an opportunity to comment, to object, and to make written submissions; and the final order of the Commission must be based upon substantial evidence." *Grindstone Butte Mut. Canal v. Idaho Power Co.*, 574 P.2d 901, 907 (Ida., 1978).

The instant case is not unlike that of *State v. Guardian Funeral Home*, 429 P.2d 732, 736-737 (Okla., 1967). In *Guardian, supra.*, an administrative board revoked the license of a funeral home which had engaged in conduct in violating Oklahoma statutes. The original charge levied in the complaint related to the funeral home entering into contracts for pre-arranged funeral services or plans. However, the Board heard evidence and rendered findings which concluded that the funeral home was guilty of improperly soliciting business. The Oklahoma Supreme Court held that this was *prejudicial error*.

"This was not set forth as a charge in the complaint and the notice to the funeral home did not appear in the

original order. It was not an issue in the hearing before the Board. The funeral home was not put on notice that it was charged with this offense. . . .

The rule that the pleading and proof must conform is relaxed in administrative proceedings. *However, while the scope of a hearing should not be arbitrarily limited, to those raised by the pleadings. A hearing should be confined to the points at issue, so as to insure the persons affected full opportunity to be heard on any matter before a ruling thereon is made.*" (Emphasis added.)

In the instant case, it is glaringly obvious that the Board heard evidence, and rendered findings which were in complete variance with the original charge. Moreover, as will be subsequently demonstrated in this brief, there was no proof to even support some of the ancillary findings of fact made. Appellant submits that it was prejudicial error for the Board to conduct the hearings in this manner.

In *Stacey v. Board of Accountancy*, 553 P.2d 1074, 1076-1078 (Or., 1976), the Oregon State Board of Accountancy similarly revoked the Appellant's license to practice as a Certified Public Accountant. The initial complaint filed charged the accountant with gross negligence in his practice. However, the Board not only rendered findings which concluded that the accountant was grossly negligent, but they also concluded that he was dishonest in his practice.

The Court in reviewing the decision of the State Board first held that substantial evidence actually existed to support the finding of gross negligence. However, the Court also held that it was improper to make any findings concerning acts or dishonesty because the complaint did not charge the accountant with that activity specifically.

The Oregon Statute is almost identical with the provisions of N.R.S. §233B.121.

Thus, it can readily be seen that The Board acted improperly when it heard evidence and made findings unrelated to the charge of marker forgery and embezzlement. Had The Board desired to proffer additional charges against ALTON CLARK BINGHAM, then it would have been a simple matter to file an amended complaint before the hearing commenced. The instant case is in many respects the reverse of the *Stacey, supra.* case. That is here, The Board initially charged ALTON CLARK BINGHAM solely with being dishonest, but later found that he was negligent in his implementation of accounting procedures for the South Point Nevada Club. In the *Stacey case, supra.*, the Board charged gross negligence, and later added on a charge of dishonesty. The necessary conclusion then is that ALTON CLARK BINGHAM was not afforded due process of law. He was entitled to defend only those charges which were properly brought and cited in the complaint.

II.

THERE WAS A VIOLATION OF PETITIONER'S RIGHT TO CONFRONT WITNESSES AGAINST HIM.

One of the findings made by The Board was that Petitioner "admitted he forged the signature of Mr. Jenkins on automobile leases, checks and other documents". The Mr. Jenkins referred to in the finding was the former owner of the South Point Nevada Club at the time that ALTON CLARK BINGHAM worked there as Comptroller. In

effect, Mr. Jenkins was ALTON CLARK BINGHAM'S employer and the party which would have been aggrieved by any wrongful activity of the Petitioner. During the hearing, Mr. Jenkins was subpoenaed to testify by The Board against MR. BINGHAM. After being sworn, however, Mr. Jenkins curiously refused to answer any questions by invoking the Fifth Amendment to the United States Constitution. Faced with Mr. Jenkins' refusal to testify, counsel for The Board introduced, over objection, a transcript which was the product of an investigation by agents of the Nevada State Gaming Control Board. This transcript included statements of John Jenkins made outside the presence of ALTON CLARK BINGHAM or his counsel. In short, neither Petitioner nor his counsel were given the opportunity to confront or cross-examine Mr. Jenkins concerning his statements made to the State Gaming Control Board.

Despite Appellant's objections, counsel for The Board decided to mark the transcript as an exhibit and read portions from the transcript into the record. The statements which were read into the record indicated that at some point in time while Appellant was working for the South Point Nevada Club, he had admitted to John Jenkins that he had forged Jenkins' signature on contracts which related to the insurance on three leased cars. (*Ibid.* at 179). The Jenkins' transcript also indicated that Mr. BINGHAM had one time promised him that he would "never do it again." (*Ibid.*) It is from this "evidence" that The Board rendered the findings of fact to which Petitioner takes exception. Petitioner insists that this procedure not only violated his statutory and constitutional right to confront the witness against him, but also erroneously permitted The Board to make a finding based solely on hearsay proof.

By Statute, Petitioner is specifically given the right to con-

front witnesses against him, and cross-examine them concerning their allegations. Thus, N.R.S. § 628.410(4) mandates that "at any hearing, the accused may appear in person and by counsel, produce evidence and witnesses on his own behalf, *cross-examine witnesses*, and examine such evidence as may be produced against him." (Emphasis added.) The Administrative Procedures Act also requires The Board to permit an aggrieved party the right of cross-examination. Thus, N.R.S. § 233B.123(4) provides: "*Each party may call and examine witnesses, introduce exhibits, cross-examine opposing witnesses on any matter relevant to the issues even though such matter was not covered in the direct examination, impeach any witness regardless of which party first called him to testify, and rebut the evidence against him.*" (Emphasis added.) Nevertheless, despite the statutory mandates, The Board permitted the introduction of transcript "testimony", and precluded Petitioner his right to cross-examine the "witness".

Putting aside the statutorily mandated confrontation right, Petitioner also submits that The Board was required to constitutionally permit cross-examination of adverse witnesses. The United States Supreme Court has made this abundantly clear in the case of *Goldberg v. Kelly*, 397 U.S. 254, 269, 25 L.Ed.2d 287, 300, 90 S.Ct. 1011 (1970). In *Goldberg, supra*, the Court discussed the requirements of due process in the context of administrative hearings, and held:

"In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses . . .

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual,

and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of testimony of individuals whose memories might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment. This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, but also in all types of cases where administrative actions are under scrutiny."

See also, Hert v. J.J. Newberry Co., 587 P.2d 11, 12 (Mont., 1978) ["the right of cross-examination of adverse witnesses in administrative proceedings is constitutionally protected..] and *Employers Commercial Union v. Schoen*, 519 P.2d 819, 824 (Alaska, 1974) [wherein the Court held that the denial of a statutory right to cross-examine a doctor's report in an administrative proceeding could not "be regarded as harmless error."]

Counsel for The Board ignored Petitioner's confrontation objection, and instead justified his reading of the transcript pursuant to N.R.S. § 51.325. This Statute which delineates the hearsay exception of "former testimony" could not abrogate Petitioner's constitutional and statutory right to confront the witnesses. However, even assuming Petitioner did not have a statutory or constitutional right to cross-examine adverse witnesses, Petitioner submits that The Board's counsel was in error even under the "former testimony" exception.

N.R.S. §51.325 provides, in pertinent part:

“Testimony given as a witness at . . . a different proceeding [is not hearsay] if:

- (1) The declarant is unavailable as a witness; *and*
- (2) If the proceeding was different, *the party against whom the former testimony is offered was a party . . . and the issues are substantially the same.*” (Emphasis added.)

Petitioner submits that the requirement of sub-paragraph (2) was not met. Simply stated, Petitioner was not a party to the investigation made by the State Gaming Control Board. Moreover, he was not present when Mr. Jenkins gave his statement to the gaming agents. Consequently, the Jenkins’ transcript was purely hearsay—it did not qualify as “former testimony” under the Statute.

Courts have also held that it is prejudicial error to base a finding of fact *solely* on hearsay evidence. While Petitioner recognizes that hearsay is normally admissible in the context of administrative proceedings, hearsay evidence may never be the only basis to support a factual determination. *See e.g. Consolidated Edison Co. v. National Labor Relations Board*, 308 U.S. 197, 230, 59 S.Ct. 206, 83 L.Ed. 126, 140 (1938); *Steen v. Board of Civil Service*, 160 P.2d 816, 822 (CA., 1945); *cf. J.D. Hedin Construction Co. v. United States*, 408 F.2d 424, 428 (1969). Such an impermissible use of hearsay evidence itself constitutes a denial of due process.

In effect, a transcript “testified” against ALTON CLARK BINGHAM. This transcript was the only source of “evidence” which supported the finding of fact delineated in Paragraph 5(g). Petitioner, therefore, submits that he was denied his statutory and constitutional right to confront the principal adverse witness against him, and thus denied due process.

CONCLUSION

For the above indicated reasons, it is respectfully submitted that this Honorable Court grant a hearing on the Petition for Writ of Certiorari.

Respectfully submitted,

WILLIAM B. TERRY, ESQ.
520 South Fourth Street
Las Vegas, Nevada 89101
Telephone: (702) 384-5563

Attorneys for Petitioner:
ALTON CLARK BINGHAM

CERTIFICATE OF SERVICE

It is hereby certified that three true and correct copies of the foregoing Petition for Writ of Certiorari were mailed, postage prepaid, on the 6th day of February, 1984, to BRYAN McKAY, Attorney General, Heroes Memorial Building, Carson City, Nevada 89701, and MELVIN BRUNETTI, ESQ., 402 North Division Street, Carson City, Nevada 89701.

APPENDIX "A"

In the Supreme Court of the State of Nevada

| | |
|-----------------------|---|
| No. 14311 |) |
| ALTON CLARK BINGHAM, |) |
| Appellant, |) |
| vs. |) |
| NEVADA STATE BOARD OF |) |
| ACCOUNTANCY, |) |
| Respondent. |) |

ORDER DISMISSING APPEAL

This is an appeal from an order affirming respondent Board's decision to revoke appellant Bingham's license to practice certified public accounting. Bingham raises multiple contentions on appeal.

Bingham first contends that the district court erred in finding that the Board did not deny his right to due process by entertaining evidence and making findings at variance with the charges in the complaint filed against him. Because the record reveals that Bingham received prior notice of the nature of the proceedings against him, we reject this contention. *See Nevada St. Apprenticeship v. Joint Appren.*, 94 Nev. 763, 587 P.2d 1315 (1978).

Bingham next contends that the admission into evidence of a certain transcript violated both his right to confront adverse witnesses and the hearsay rule. Because the

statements in the transcript were sufficiently corroborated by other evidence adduced at Bingham's hearing, this contention is without merit. *Cf. Biegler v. Nevada Real Est. div.*, 95 Nev. 691, 601 P.2d 419 (1979) (hearsay statements, though admissible in evidence, will not, *without corroboration*, support suspension of a license).

Finally Bingham contends that certain evidence was admitted in violation of the best evidence rule, and that the evidence was insufficient to support the Board's finding that he was guilty of embezzlement. We reject both contentions. *See* NRS 233B.123(1); 233B.140(5).

In light of the above determinations, we
ORDER this appeal dismissed.

/s/ Manoukian, C.J.

/s/ Springer, J.

/s/ Mowbray, J.

/s/ Steffen, J.

/s/ Gunderson, J.

cc: Hon. Robert G. Legakes, District Judge
Goodman, Terry, Stein & Quintana
Allison, Brunetti, MacKenzie, Hartman,
Soumbeniotis & Russell
Loretta Bowman, Clerk

APPENDIX "B"

In the Supreme Court of the State of Nevada

| | |
|-----------------------|---|
| No. 14311 |) |
| ALTON CLARK BINGHAM, |) |
| Appellant, |) |
| vs. |) |
| NEVADA STATE BOARD OF |) |
| ACCOUNTANCY, |) |
| Respondent. |) |

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).
It is so ORDERED.

/s/ Manoukian, C.J.

/s/ Springer, J.

/s/ Mowbray, J.

/s/ Steffen, J.

/s/ Gunderson, J.

cc: Hon. Robert G. Legakes, District Judge
William B. Terry
Thomas J. Ray
Loretta Bowman, Clerk

NO. 83-1306

Office - Supreme Court, U.S.

FILED

FEB 17 1984

ALEXANDER L. STEVAS

CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALTON CLARK BINGHAM,

Petitioner,

v.

NEVADA STATE BOARD OF ACCOUNTANCY,

Respondent,

SUPPLEMENTARY APPENDIX TO PETITION FOR A WRIT OF
CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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Attorney for Petitioner:

ALTON CLARK BINGHAM

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APPENDIX A

In the Supreme Court of the State of Nevada

ALTON CLARK BINGHAM,
Appellant,

vs.

NEVADA STATE BOARD OF
ACCOUNTANCY,
Respondent.

No. 14311

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).
It is so ORDERED.

/s/ Manoukian, C.J.

/s/ Springer, J.

/s/ Mowbray, J.

/s/ Steffen, J.

/s/ Gunderson, J.

cc: Hon. Robert G. Legakes, District Judge
William B. Terry
Thomas J. Ray
Loretta Bowman, Clerk

APPENDIX "B"

**STATE OF NEVADA
Before the
NEVADA STATE BOARD OF ACCOUNTANCY**

Case No. 149

**NEVADA STATE BOARD OF
ACCOUNTANCY,**
Complainant,

vs.

**ALTON CLARK BINGHAM,
CERTIFIED PUBLIC
ACCOUNTANT**

Respondent.

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DECISION**

This matter coming on for hearing on Monday, December 10, 1979, at 11:50 o'clock a.m. before the Nevada State Board of Accountancy, at the conference room at Laventhal & Horwath, 714 South Fourth Street, Las Vegas, Nevada, upon the Complaint and Order to Show Cause and the Notice of Hearing which were mailed to Respondent by certified mail, return receipt requested, on September 14, 1979 and a copy was personally served on Respondent on September 17, 1979. Present at the hearing were: Board member, John F. Rhodes, Jr., C.P.A., who presided over the hearing; Board

Secretary-Treasurer, Lola F. Farmer, P.A.; and Board members: William R. Ernst, C.P.A.; Merlin J. Jones, C.P.A.; and Mary O. Knapp, C.P.A. Board President, C. William Geyer, C.P.A., and Board member Robert T. Ashworth, C.P.A., disqualified themselves and the Respondent stipulated to allow the five remaining Board members to comprise the Board and hear the full matter. Melvin Brunetti, Esq., of Allison, Brunetti, MacKenzie & Taylor, appeared as counsel for the Board, and the Respondent, Alton Clark Bingham, C.P.A. appeared and testified in his own behalf and was represented by his counsel William B. Terry, Esq., and Martin J. Kravitz, Esq., of Goodman, Oshins, Brown and Singer, Chartered. Court reporters of Brower and Associates, Las Vegas, Nevada, were present to record the proceedings. The hearing proceeded through December 10 and 11, 1979, was continued to January 28 and 29, 1980, and was finally completed on February 11, 1980.

Having heard the testimony of the witnesses and having considered all the evidence presented and being fully advised in the premises, the Board now makes its Findings of Fact, Conclusions of Law and Decision as follows:

FINDINGS OF FACT

1. On September 17, 1979, Respondent, Alton Clark Bingham, was served with a copy of the Complaint and Order to Show Cause and the Notice of Hearing in this matter, and thereafter Respondent personally appeared with his counsel at the time and place set for such hearing.
2. On February 26, 1966, Complainant granted Respondent a Certificate No. 226, to practice as a Certified Public Accountant in the State of Nevada, and an annual permit to

practice was issued to said Respondent.

3. Respondent's Certified Public Accountants' Certificate No. 226 and annual permit to practice issued by the Nevada State Board of Accountancy are still issued and presently in full force and effect.

4. During the Respondent's period of employment at the Southpoint Nevada Club, he held the title of controller and general manager. His title and authority, during the term of his employment, was subordinate only to the owner of the Southpoint Nevada Club and included supervision over, among other things, the accounting department, office and cage operation, vault operation, hotel and kitchen. Respondent would approve an extension of credit for gambling, by the use of markers, by application of his initials within a circle, on the marker document. Respondent would issue markers from the vault and transfer the markers to the cage area in exchange for currency. Access to the vault, and therefore, access to substantial sums of money, was granted to the Respondent.

The duties and responsibilities of the controller/general manager include the adherence to good internal accounting and administrative controls. Certified Public Accountants are specifically trained and knowledgeable in the application of internal accounting control and the effect it has on the safeguarding of assets. Segregation of duties, execution of responsibilities in accordance with management directions and establishment of checks and balances all fall within the purview of internal accounting control. The controller/general manager in gaming establishments is responsible for the adherence to and compliance with the rules and regulations of the Nevada Gaming Commission and State Gaming Control Board.

5. During his period of employment at the Southpoint Nevada Club, the Respondent did engage in the following acts discreditable to the public accounting profession under NRS 628.390(11) and which are in violation of NRS 628.390(4), violation of a rule of professional conduct promulgated by the Board:

A. Received \$2,000 currency in exchange for a marker without the debtor being present. The marker ultimately was determined to be fraudulent.

B. Between January 12, 1978 and March 7, 1978, participated in the embezzlement of various funds from the Southpoint Nevada Club.

C. Failed to exercise due diligence in the adherence to acceptable internal accounting controls. Funds were transferred between the cages, vault and office drawer in exchange for markers and hold checks. Accountability, control and the safeguarding of Southpoint Nevada Club cash was allowed to deteriorate to the point of non-existence.

D. Failed to adhere to the written and diagrammatic system of control submitted to the Gaming Control Board. Violated the granting of credit procedures as established by Regulation 6 by issuing markers out of the cage and vault.

E. Participated in the collection of the Seekins marker by the transfer of real estate from Mr. Seekins to the owner of the Southpoint Nevada Club and the substitution of the owner's markers for those of Mr. Seekins. The transactions effected were without apparent regard to the Federal and State tax regulations on the exchange, or the possible depletion of company resources.

F. Admitted to two persons that he had embezzled funds by the use of markers and stated to them that he felt

that he owed Mr. Jenkins in the neighborhood of \$50,000 to \$55,000 as a result of the embezzlements.

G. Admitted that he forged the signature of Mr. Jenkins on automobile leases, checks and other documents.

6. Rule 5.01 of the Rules of Professional Conduct of the Board provides:

A permit holder shall not commit an act discreditable to the profession.

7. NRS 628.390 provides in part as follows:

After notice and hearing . . . the board may revoke, or may suspend for a period not to exceed 3 years, any certificate . . . or may censure the holder of any such permit, for any one or any combination of the following causes:

4. Violation of a rule of professional conduct promulgated by the Board under the authority granted by this chapter.

CONCLUSIONS OF LAW

1. Respondent was given due notice and opportunity to be heard as provided by statute, and following such notice and hearing the Board is convinced that Respondent did engage in acts discreditable to the profession when he:

A. Accepted \$2,000 in exchange for a marker without the customer being present, such marker subsequently determined to be fraudulent;

B. Participated in the embezzlement of various funds from the Southpoint Nevada Club;

C. Failed to exercise due diligence in the adherence

to internal controls and the Regulation 6 submission to the Gaming Control Board;

D. Participated in the settlement of the outstanding Seekins marker;

E. Admitted forging signatures on automobile leases, checks and other documents;

and that as a consequence of such conduct, Respondent's certificate to practice public accounting ought to be revoked.

DECISION

1. The Certificate No. 226, issued to Respondent February 26, 1966, authorizing him to practice certified public accounting in the State of Nevada is hereby revoked.

DONE AND DATED: This 26th day of June, 1980.

NEVADA STATE BOARD OF ACCOUNTANCY

By:

/s/ John F. Rhodes, Presiding Member

/s/ Lola F. Farmer, Member

/s/ Merlin J. Jones, Member

/s/ William R. Ernst, Member

/s/ Mary O. Knapp, Member

CERTIFICATE OF SERVICE BY MAILING

It is hereby certified that three true and correct copies of the foregoing Supplementary Appendix to Petition for a Writ of Certiorari to the Supreme Court of the State of Nevada were mailed, postage prepaid, on the 17th day of February, 1984, to BRYAN McKAY, Attorney General, Heroes Memorial Building, Carson City, Nevada 89701, and MELVIN BRUNETTI, ESQ., 402 North Division Street, Carson City, Nevada 89701.

No. 83-1306

Office - Supreme Court, U.S.
FILED
MAR 15 1984
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CLERK

In the
Supreme Court of the United States
October Term, 1983

ALTON CLARK BINGHAM,

Petitioner,

v.

NEVADA STATE BOARD OF ACCOUNTANCY,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Is there a due process violation when an administrative body, here the Board of Accountancy for the State of Nevada, entertained evidence and made findings which were at variance with the charges in the Complaint?
2. Was there a violation of petitioner's constitutional right to confront witnesses against him?

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NEVADA STATE BOARD OF ACCOUNTANCY,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI

RESPONDENT'S BRIEF IN OPPOSITION

Respondent for the reasons set forth herein, respectfully requests this Honorable Court to deny Petitioner's Petition for Writ of Certiorari.

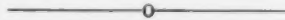
CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner argues that this case involves the Fourteenth Amendment to the United States Constitution wherein it is stated:

“Nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction, the equal protection of the law.”

and the Sixth Amendment to the United States Constitution, wherein it is stated:

In all criminal prosecutions, the accused shall . . . be confronted with the witnesses against him . . .”



STATEMENT OF THE CASE

Procedural Background

On September 14, 1979, the Respondent, NEVADA STATE BOARD OF ACCOUNTANCY, (hereinafter referred to as “NSBA”) filed a Complaint, Order to Show Cause and Notice of Hearing directed against the Petitioner, ALTON CLARK BINGHAM, (hereinafter referred to as “Mr. Bingham”), a certified public accountant. Hearings were conducted before NSBA on December 10, 1979, January 28, 29 and February 11, 1980, with NSBA rendering its findings of fact, conclusions of law and a decision on June 26, 1980, revoking Mr. Bingham’s certificate to practice as a Certified Public Accountant in the State of Nevada.

Mr. Bingham sought judicial review of this decision from the Eighth Judicial District Court of the State of Nevada, which, following arguments theretofore, entered its Order on September 7, 1982, affirming NSBA's decision. The Supreme Court of the State of Nevada on September 27, 1983, entered its decision dismissing Mr. Bingham's appeal and on November 9, 1983, denied Mr. Bingham's Petition for Rehearing.

Factual Background

The NSBA's complaint against Mr. Bingham alleged that Mr. Bingham had violated Nevada Revised Statutes 628.390 (2) (4) and (11) and Rule 5.01 of the State Board of Accountancy Rules of Professional Conduct, for he had committed acts "discreditable to the profession."

On October 3, 1979, Mr. Bingham sought a more definite statement and requested production of documents, and based on this application the hearing originally set for October 18, 1979, was continued to December 3, 1979, NSBA then supplied to Mr. Bingham on November 2, 1979, the names and addresses of all witnesses and copies of all documents to be submitted into evidence to support its charge that Mr. Bingham had committed "fraudulent and discreditable acts."

On June 26, 1980, NSBA rendered its findings of fact, conclusions of law, and decision, determining in part that Mr. Bingham did engage in the following acts discreditable to the public accounting profession under NRS 628.390(2) and NRS 628.390(4) and in violation of the Rule 5.01 of the State Board of Accountancy Rules of Professional Conduct: (a) Received \$2,000.00 currency in exchange for a

marker without the debtor being present. The marker ultimately was determined to be fraudulent, (b) Between January 12, 1978 and March 7, 1978, participated in the embezzlement of various funds from the Southpoint Nevada Club, (c) Failed to exercise due diligence in the adherence to internal accounting controls, (d) Failed to adhere to written and diagrammatic system of control submitted to the Gaming Control Board (e) Participated in the collection of the Seekins marker by the transfer of real estate from Mr. Seekins to the owner of the Southpoint Nevada Club and the substitution of the owner's markers for those of Mr. Seekins. The transactions were effected without apparent regard to the Federal and State tax regulations on the exchange, or the possible depletion of company resources, (f) Admitted to two persons that he had embezzled funds by the use of markers and stated to them that he felt that he owed Mr. Jenkins (owner of Southpoint Nevada Club) in the neighborhood of \$50,000.00 to \$55,000.00 as a result of the embezzlements, and (g) Admitted that he forged the signature of Mr. Jenkins on automobile leases, checks and other documents.



REASONS FOR DENYING THE WRIT

As set forth in Rule 17, Rules of the Supreme Court of the United States, a Writ of Certiorari will only be granted when there are special and important reasons therefor, and in making this determination, the Court will consider the criteria set forth the Rule 17. It is submitted to the Court that Mr. Bingham's Petition does not involve a Federal

question in conflict with the decision of another State Court of Record or a Federal Court of Appeals, nor does it involve an important Federal question of federal law which should be settled by this Court.

I.

The decision rendered by the Supreme Court of the State of Nevada does not significantly conflict with decisions of other states on this Federal question.

The decision rendered by the Supreme Court of the State of Nevada determined that Mr. Bingham had received prior notice of the proceedings against him, and as such rejected his contention that his right to due process was violated based on Mr. Bingham's assertion that NSBA rendered findings which were in complete variance with the charges in the Complaint filed thereagainst.

The Nevada Supreme Court, relied on its earlier holding in *Nevada St. Apprenticeship v. Joint Appren.*, 94 Nev. 763, 587 P.2d 1315 (1978), wherein this Court held that, "... due process requirements of notice are satisfied where the parties are sufficiently appraised of the nature of the proceedings so that there is no unfair surprise. The crucial element is adequate opportunity to prepare."

This determination is consistent with the decisions rendered by this Court and the Courts of other States. Additionally, the Nevada Supreme Court as reflected from the short recitation of facts above, properly applied the law to the facts before it.

The authorities cited by Mr. Bingham, *Checker, Inc. v. Public Serv. Comm'n.*, 84 Nev. 623, 467 P.2d 981 (1968);

Grindstone Butte Mut. Canal v. Idaho Power Co., 574 P.2d 901 (Ida., 1978); *State v. Guardian Funeral Home*, 429 P.2d 732 (Okla., 1967); and *Stacey v. Board of Accountancy*, 553 P.2d 1074 (Or., 1976); all dealt with cases where the findings contained in the decision were totally unrelated to the changes contained in the notices, which is in total contradiction to the facts of this case.

II.

The Decision rendered by the Supreme Court of the State of Nevada is consistent with the prior Decision of this Court and other State Courts.

Mr. Bingham argues that NSBA at its hearing improperly allowed into evidence, over objection, a transcript of the testimony given by a Mr. Jenkins to agents of the Nevada State Gaming Control Board. Said testimony was being offered because Mr. Jenkins refused to testify at the hearing after being sworn, by invoking the Fifth Amendment to the United States Constitution.

The Supreme Court of the State of Nevada held in its decision that the statements made in the transcript were sufficiently corroborated by other evidence adduced at Mr. Bingham's hearing, and as such no violation of Mr. Bingham's right to confront an adverse witness occurred, citing *Biegler v. Nevada Real Est. Division*, 95 Nev. 691, 601 P.2d 419 (1979).

This determination is consistent with the determinations of this Court and other State Courts holding that hearsay testimony is sufficient to support an administrative finding. *Richardson v. Perales*, 402 U.S. 389, 409, 91 S.Ct. 1420, 1431, 28 L. Ed.2d 842 (1971).

CONCLUSION

Respondent respectfully requests this Court to deny the Petition for a Writ of Certiorari.

DATED this 14th day of March, 1984.

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